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IN THE

# Supreme Court of the United States

OCTOBER TERM 1961

No. 271

MARIETTA PAGE,

*Petitioner,*

*vs.*

TELFORD WORK, *et al.*,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI.

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## PETITION FOR WRIT OF CERTIORARI.

Petitioner Marietta Page, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case March 8, 1961.

### Opinions Below.

The opinion of the District Court [R. 1008-1009] is reported at 178 F. S. 184. The opinion of the Court of Appeals is not yet reported. The opinion of the Court of Appeals denying petitioner's Petition for a Rehearing is not yet reported. Said opinions are printed as appendixes A, B, and C, respectively, to this Petition.

### Jurisdiction.

The Judgment of the Court of Appeals was entered March 8, 1961, a Petition for Rehearing was filed April 6, 1961, and the Opinion of the Court of Appeals denying a rehearing was entered May 3, 1961.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

**Questions Presented.**

1. Does jurisdiction of the District Court in a private antitrust suit depend upon whether or not the defendant conspirators, found by the Court to be engaged in interstate commerce, did more or less interstate commerce after they forced a sale to them of the assets of a competitor, found by the Court to be engaged in interstate commerce, by acts constituting *per se* violations of the Sherman and Clayton Acts?

2. Does the quantity of commerce involved become material in determining whether activities prohibited by the Sherman and Clayton Acts occurred within the flow of commerce?

3. Whether activities prohibited by the Sherman and Clayton Acts either occurring within the flow of commerce or only affecting commerce between the states must result or tend to result in the control of an interstate market in order to be actionable?

4. Does Section 18 of Title 15 U. S. C. prohibit the acquisition by more than 100 newspapers found by the trial court to be engaged in interstate commerce of the assets of a competing newspaper found by the trial court to be engaged in interstate commerce where the admitted purpose of the purchase was for the "competitive advantages" the defendants would "all share mutually" [R. 614.]?

5. Has Petitioner been deprived of her right to a jury trial on disputed issues of fact by the Court of Appeals' treatment of the case as if it were an appeal from an adverse judgment after a trial on the

merits of the jurisdictional issue when in fact it was an appeal from an order granting summary judgment?

**Statutes Involved.**

The Constitution of the United States provides in pertinent part as follows:

> "Amendment VII. . . .
>
> In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Title 15 U. S. C. Section 1 as is pertinent here reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

Title 15 U. S. C. Section 2 as is pertinent here reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

Title 15 U. S. C. Section 15 as is pertinent here reads as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any District Court of the United States in the district in which

the defendant resides or is found or has an agent, with respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Title 15 U. S. C. Section 18 as is pertinent here reads as follows:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

Rule 56 of the Federal Rules of Civil Procedure as is pertinent here reads as follows:

"(b) A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory

judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c). . . the judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

## Statement of the Case.

This action was instituted by Petitioner on behalf of Consolidated Printing and Publishing Company, a dissolved California corporation, hereinafter called "Consolidated," by way of a stockholders' derivative civil antitrust action for treble damages. It is the companion case to *C. A. Page Publishing Co., Inc. v. Telford Work, et al.*, hereinafter referred to as "the Companion case."

Jurisdiction of the District Court was invoked under 15 U. S. C. Sections 1, 2, 4, 15 and 18 [R. 483] on the grounds that Consolidated was engaged in interstate commerce and was forced to sell its assets to Mutual Newspaper Publishing Company, a California corporation, acting for and on behalf of the defendants below, each of whom were engaged in the interstate business of printing and publishing a newspaper or acting for and on behalf of such a newspaper publisher, as the proximate result of a conspiracy between the defendants and each of them to restrain the trade and commerce between the states in the business of printing and publishing newspapers, and to monopolize

the legal advertising part of said business in the County of Los Angeles. [R. 485.]

The case was at issue on Petitioner's Fourth Amended Complaint filed October 1, 1956 [R. 3 *et seq.*], and the Answer of Defendants Telford Work, *et al.*, filed December 20, 1956, [R. 50 *et seq.*] and Amendment to Answer of Defendants Telford Work, *et al.*, and Rogers and McDonald Publishers Inc., filed October 27, 1958 [R. 481 *et seq.*] Pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of the United States District Court, Southern District of California, Central Division, the District Court made its Pre-Trial Conference Order on October 31, 1958, supplementing the pleadings. [R. 483 *et seq.*]

At the suggestion of the Trial Court [R. 1133] made the day before the case was set for trial before a jury defendants filed a Motion for Summary Judgment. [R. 623 *et seq.*] Petitioner filed her Opposition to Defendants' Motion for Summary Judgment April 3, 1959 [R. 855 *et seq.*]

Defendants' Motion for Summary Judgment was on the grounds that there was no genuine issue as to certain material facts which were determinative of the action and that they were entitled to judgment as a matter of law. [R. 623.] The alleged facts relied upon as being determinative of the action by Defendants in their Motion were as follows: That legal advertising is a local activity and not trade or commerce among the several states; that the relevant market involved in this case is the publication of legal advertising in Los Angeles and the other activities of the parties are not involved; that no substantial part of trade or commerce among the several states is involved in the relevant market;

that the local intrastate activity of legal advertising did not affect interstate commerce; and finally, that Consolidated voluntarily liquidated its business. [R. 623-630.] Defendants' Motion was supported by a summarization of stipulated facts, answers to requests for admissions and interrogatories, depositions, excerpts from proposed exhibits and affidavits by Edythe Jacobs, Edward T. Bergin, and Telford Work. [R. 633 *et seq.*] The affidavit of Edythe Jacobs recited the source and method of her preparation of summaries of facts relied upon. [R. 726-727.] The affidavit of Telford Work dealt with the purchase of out-of-state supplies and newsprint by the Defendants, a comparison of the Defendants' cost of some of their out-of-state supplies with the total consumption of said supplies in the State of California, the out-of-state content of Defendants' newspapers, the percentage of Defendants' receipts from legal advertising revenues. [R. 804 *et seq.*] The affidavit of Edward T. Bergin stated the results of a survey made by him to determine the percentage of legal advertising lineage to the total amount of lineage of all advertising published in certain newspapers which were members of the Los Angeles Newspaper Bureau, one of the Defendants, during the period 1931 to July 31, 1952, and analysis of Consolidated's receipts during the five years preceding its dissolution, and a comparison thereof with the preceding five years, a similar analysis of the dividends paid by Consolidated to its stockholders. [R. 846 *et seq.*]

Plaintiff's Opposition to Defendants' Motion consisted of her statement in opposition [R. 855 *et seq.*], Declaration of Kay Alexander filed in the Companion Case [R. 877 *et seq.*], and incorporated by reference in

this case [R. 861], Declaration of Charles A. Page, Jr., filed in the Companion Case [R. 871] incorporated by reference in this case [R. 861], Declaration of Dudley K. Wright, filed in the Companion Case [R. 887] and incorporated by reference in this case [R. 861], testimony of Telford Works [R. 1065 *et seq.*], Answers to Requests for Admissions and Interrogatories [R. 1019-1064], and Plaintiff's Opposition to Defendants' Prior Motion for Summary Judgment in the Companion Case incorporated by reference in this case [R. 861-862], affidavits of Marietta Page [R. 592], Dudley K. Wright [R. 595], Herbert G. Bowles [R. 617], and Henry A. Babcock [R. 594], in opposition to Defendants' prior Motion in this case, which affidavits were incorporated by reference in opposition to the Motion of Defendants [R. 860], stipulated facts [R. 66-481], and exhibits marked for identification [R. 1016-1065.] Plaintiff's position adopted in her Opposition to Defendants' Motion was that either the trial court had jurisdiction as a matter of law or there was a triable issue of fact on the question of jurisdiction. [R. 855.]

The Trial Court rendered an opinion in this case October 23, 1959. [R. 993 *et seq.*] The Trial Court made its Order for Summary Judgment dismissing the action for want of jurisdiction November 23, 1959 [R. 1002-1003], executed Findings of Fact and Conclusions of Law on Motion for Summary Judgment November 23, 1959 [R. 1003 *et seq.*], and its Judgment dismissing the action was filed and entered November 23, 1959. [R. 1008-1009.]

The Trial Court found that the plaintiff and defendant newspapers engaged in interstate commerce by virtue of (1) their regular purchase of newsprint from

sources outside of California, (2) their carriage of some national news feature items, (3) their carriage of some national advertising, (4) a few out-of-state subscribers [R. 1005-1007]; that even if Consolidated has been eliminated by reason of Defendants' activities in relation to legal advertising, such elimination would not have interfered with the flow of national news and classified advertising in interstate commerce [R. 1006]; that no showing was made that Defendants had a control or potential control over interstate markets for newsprint, national display advertising, or dissemination of national news [R. 1006]; that control by Defendants of legal advertising could afford Defendants no leverage to gain control of interstate markets in newsprint, national news, or national display advertising since major users of these services and commodities, the metropolitan newspapers, are not dependent upon revenues from legal advertising [R. 1006-1007]; that no appreciable interstate market exists either for Los Angeles legal advertising or for legal advertising in Los Angeles placed by out-of-state clients, and no such interstate market exists [R. 1007]; that the Los Angeles Daily Journal, Consolidated's newspaper, is the only newspaper involved which is primarily devoted to legal advertising and whose out-of-state readers are particularly interested in legal advertising, and that it has only thirteen out-of-state subscribers and that legal advertisements for out-of-state clients appear in the Journal regularly, though on a very small scale, and a great majority of these items are placed by local counsel, and that such activities are not "substantial" or "appreciable" amounts of interstate commerce by any standard and come within the maxim of *de minimis*. [R. 1007.]

The Trial Court in its Conclusions of Law concluded that there was no genuine issue as to any of the foregoing facts and that those facts were determinative of the action, and that the market involved was an intrastate activity, not in trade or commerce between states, and that the interstate trade or commerce of Plaintiff and Defendants did not suffer any "anti-competitive" effects from acts of the Defendants, and that the acts of the Defendants in legal advertising did not have an "anti-competitive" effect on any interstate market and that the court therefore did not have jurisdiction, and that Summary Judgment should be granted to Defendants. [R. 1007-1008.]

The Court of Appeals for the Ninth Circuit affirmed the Trial Court's judgment by treating the case as if it were an appeal from an adverse judgment after a trial on the merits of the jurisdictional issue. Petitioner filed a Petition for Rehearing [Supp. R. ....] after which the Court of Appeals conceded, "that we may have been in error in holding that Appellant in effect consented to a separate trial before the Court on the separate issue of jurisdiction." The Court of Appeals did not, however, rewrite its Opinion, the conclusions of which were necessarily premised upon the treatment of the case as if it were an appeal from a trial on the merits of the jurisdictional issue.

Each of the newspaper publishers Defendants below published community newspapers which are printed and published usually on a weekly or bi-weekly basis in

the separate cities and unincorporated communities located within the County of Los Angeles [R. 503-504], and are to be distinguished from the "metropolitan newspapers" consisting of the Los Angeles Times, Los Angeles Examiner, Herald-Express, and Mirror-News. The combined circulation and dissemination of national news and national advertising of the defendant newspapers is large. [R. 834-845, 1019-1021, 1051-1064.]

> "It is a matter of common knowledge that without the lucrative income resulting from 'legal advertising' the smaller newspapers, especially weekly and biweekly publications, find it difficult to survive the competition of the metropolitan dailies." [*Petitions of Herald Publishing Company*, 152 Cal. 2d 901 at 909].

Certain of the Defendants in order to obtain the legal advertising in the County of Los Angeles caused the formation of the Los Angeles Newspaper Service Bureau, Inc., a California corporation, hereinafter called "the Bureau". The Bureau was a defendant below and its membership is 105 newspapers. [R. 175.] Each of the defendant newspaper publishers is a stockholder of the Bureau whose By-Laws limit the right to hold stock therein to owners of newspapers of general circulation who are members of the California Newspaper Publishers Association, and who have signed a representative agreement with the Bureau, and who have obtained the written consent of any prior member thereof who publishes legal advertising within the

same district or area. [R. 256-258.] The representative agreement provides that the Bureau will be the stockholder's exclusive representative in the stockholder's primary area of distribution for legal advertising. [R. 259-260.] Other community newspapers were excluded from the membership in and services of the Bureau if there was an existing stockholder within such newspaper's primary distribution area. [R. 282-283.]

In 1951 the assets of Consolidated were purchased by Mutual Newspaper Publishing Company, a California corporation formed for the purpose of such purchase by the defendant newspaper publishers through the Los Angeles Newspaper Service Bureau, Inc., Mutual's sole stockholder. [R. 1004.] Mutual was found by the Trial Court to be engaged in commerce. [R. 1004-1006.] Petitioner contends and it is not disputed for the purposes of the appeal that the sale of Consolidated's assets to Mutual was forced by the Defendants as a result of the complained of activities. [R. 1004-1005.] The reason for the purchase was "for the vital promotional and competitive advances that" the Defendants would "all share mutually" and because the Defendants were "fearful that its passage to an alien or irresponsible ownership could very easily restore the chaotic confused price situation that prevailed in the early days of our program when fictitious firm name certificates, for illustration, sold for as little as 75 cents each and public advertising was printed for as little as 14 cents per column inch." The Defendants felt that "one sure way to obviate, or at least to minimize such an unhappy competitive prospect . . . was to undertake the purchase of the newspaper" themselves. [R. 415-416.]

## REASONS FOR GRANTING THE WRIT.

### I.

### The Decisions of the Courts Below Are in Conflict With Applicable Decisions of This Court and Other Circuit Courts.

#### A. The Decisions of the Courts Below Are in Conflict With Applicable Decisions of This Court.

The Trial Court made no findings with reference to the allegations of the Complaint and the contentions contained in the Pre-Trial Conference Order referring to the conspiracy of the Defendants, the price-fixing, geographical division of the market, and other activities of the Defendants, or that said activities and conspiracy proximately injured Consolidated and forced a sale of its assets to the Defendants and Respondents. The District Court and the Court of Appeals assumed these allegations were true but held that the District Court did not have jurisdiction. To arrive at this conclusion, the Courts below enunciated two wholly erroneous rules of law that are directly opposite decisions of this Court. They held that in a private antitrust suit involving *per se* violations of Sections 1 and 2 of the Sherman Act that in order for the District Court to have jurisdiction the Defendants' activities must result in less interstate commerce and that the Defendants must have control or potential control over the interstate markets involved.

Admittedly, Consolidated, on whose behalf Petitioner brought this action, regularly purchased newsprint from interstate sources, circulated its newspapers to out-of-state subscribers, and carried at least some national news and national display advertising. (App. B, pp. 17-18.) Petitioner contended that the forced sale of Con-

solidated's assets therefore had a direct effect on the interstate newsprint market in that Consolidated no longer purchased newsprint through interstate commerce. (App. B, p. 25.) The Circuit Court's reply was:

> "The argument that the newsprint market suffered because Consolidated ceased buying newsprint is not convincing. There is no indication that Mutual, operating the same newspaper, purchased any less newsprint from out-of-state." (App. B, p. 25.)

Its further answer to the Petitioner's contention that forcing Consolidated out of business and the sale of its assets to Mutual affected interstate commerce was that,

> "The District judge found that control of the product of legal advertising and the relevant market offered no foothold to Appellees to gain control of the interstate markets in national display advertising, news dissemination, or newsprint, since the chief competition in these products—metropolitan newspapers—did not depend upon publication of legal notices for revenue. This finding is not clearly erroneous." (App. B, p. 26.)

Although the words are somewhat different, the tune is the same as used by the Circuit Court of Appeals for the Ninth Circuit in *Klor's v. Broadway-Hale Stores,* 255 F. 2d 214, reversed by this Court in *Klor's v. Broadway-Hale Stores* (1959), 359 U. S. 207. This Court stated clearly that it is the natural flow of interstate commerce that the Sherman and Clayton Acts were designed to protect and not whether more or less of an interstate product was available to the public

*(Klor's, supra)*, or whether the Defendants "purchased any less" of an interstate product (the case at bar).

The antitrust laws apply even if "the victim is just one [manufacturer] whose business is so small that his destruction makes little difference to the economy." *Radiant Burners v. Peoples Gas Light and Coke Company*, 5 L. Ed. 2d 359.

The Courts below recognized that "legal advertisements for out-of-state clients appeared in the Journal" (Consolidated's newspaper) "regularly, although on a very small scale (average five items per issue)" but concluded that "these are not 'substantial' or 'appreciable' amounts of interstate commerce by any standards, and come within the maxim *de minimis*." (App. B, p. 19.) This conclusion, particularly in view of the *per se* violations charged, is contrary to the established rules of antitrust law. The following admission by the Defendants as contained in the Minutes of the Bureau demonstrates the extent to which the *per se* violation of price-fixing successfully increased the price for legal advertising to the public:

> "During the year we were successful in arranging, effective [396] as of September first last, an increase in the rates charged for classifications of private legal advertising. These increases ran from 15 to 30 per cent with an over-all average of about 20 per cent. Also, at Christmas time we notified you that the county had allowed us a flat increase of 15 per cent in the rates for the publication of the county's advertising and for the printing of proof slips. We have requests now pending before the City Council of Los Angeles and the Los Angeles Board of Education for a

comparable percentage increase and are hopeful that those two jurisdictions of government will follow the example of the county and grant the same percentage of advance.

"I shall not take time here to remind you of the progress made during the years in the stabilization of rates from the days when Certificates of Business sold in a confused market for as little as 75 cents, to the level today where $15.00 is the prevailing price, and public advertising, which was sacrificed in the scramble of competitive bidding at 14 cents per column inch, to a standard now where the price is set by county and city ordinance at a price ranging from $1.43 to $2.74 per column inch. It is small wonder that a daily legal paper in Detroit, harassed by price-cutting tactics of multitudinous newspapers throughout Wayne County, Michigan, invited us to that State to set up a competitive Detroit Newspaper Service Bureau, Inc. in Wayne County.

"We are working with newspapers throughout the State now in the general standardization of rates and we know of newspapers in Orange County, San Diego County and Riverside County which have adopted our rate card bodily and in toto.

It is my considered judgment that it is in this field of pricing and price maintenance that our office has rendered its most notable single service to the newspaper industry of the County and State." [R. 250-251.]

This is a classic example of the reason for the *per se* rule.

**B. The Decisions of the Circuit Court of Appeals for the Ninth Circuit Is in Conflict With the Decisions of Other Circuits.**

Insofar as the decisions below require a jurisdictional test which is a quantitative test rather than a qualitative test, they are in direct conflict with the decision of the Eighth Circuit in *White Bear Theaters Corp. v. State Theater Corp.*, 129 F. 2d 600, and the decision of the Sixth Circuit in the case of *Steers v. United States*, 192 Fed. 1, and the First Circuit in the case of *Camco, Inc. v. Providence Fruit and Produce Building, Inc.*, 194 F. 2d 484, and Fourth Circuit in the case of *American Federation of Tobacco Growers v. Neal*, 183 F. 2d 869.

Insofar as the Court of Appeals decision states that "the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business," the decision is in direct conflict with the decision of Third Circuit in the case of *Evening Newspaper Publishers Co. v. Allied Newspaper Carriers*, 263 F. 2d 715, wherein the restraint applied was in the intrastate phase of local delivery of the newspapers which affected the interstate business in which the plaintiff therein was engaged. The Ninth Circuit attempts to distinguish the case at bar from the *Evening Newspaper Publishers Co. v. Allied Newspaper Carriers, supra*, case but the two are identical in theory. The restraint applied in the case at bar did exactly the same thing as did the restraint in *Evening Newspaper Publishers Co., supra*, case, *i.e.*, stop completely all interstate business of Consolidated.

## II.

## The Acquisition by Mutual of Consolidated's Assets Violated Section 18, Title 15, United States Code, and the Decisions Below Erroneously Limit the Scope of Congress' Power.

The Court of Appeals answers Petitioner's argument that the acquisition of Consolidated's assets by the Defendants through Mutual violated Section 18 of Title 15 U. S. C. by stating in effect that Congress did not have the power under the Commerce Clause of the Constitution to prohibit such an acquisition. (App. B, pp. 27-29.) This statement by the Court of Appeals is premised on the erroneous conclusion that the legal advertising market is not an interstate market. The record below demonstrates that in fact legal advertising itself is a part of interstate commerce. Both the Courts below recognize that in each issue of the Journal an average of five out-of-state legal ads appeared. It is common knowledge that all businesses must comply with the publication laws of the State of California including local and national businesses, some Bureau members published a "national legal advertising" rate [R. 115-116], annual statements for insurance companies whose home offices were located outside of California were published by the Defendants and Consolidated [R. 128-130, 813-814], the Bureau admitted handling some national legal advertising [R. 127, 810-811], the Defendants and Consolidated in connection with certain probate notices mailed notices of hearings to heirs and devisees all over the world. [R. 1022-1045.] In addition, Petitioner has consistently claimed that legal advertising was an integral part of the newspaper publishing business in Los Angeles County and the Trial Court made no finding that it was not.

The relevant market with reference to Petitioner's claim of a Section 18 Title 15 U. S. C. violation is the legal advertising market in Los Angeles County. Since Consolidated had virtually all of that market before the Bureau was formed [R. 215-216] and since the metropolitan papers did not compete for legal advertising [R. 816], and since the Defendants found it necessary to form the Bureau in order to compete for legal advertising [R. 164-165], it is clear that the Bureau and Consolidated controlled a substantial part of the relevant market. It therefore follows that the acquisition by Mutual of the assets of Consolidated substantially lessened the competition or tended to create a monopoly in the relevant market.

The purchase by the Defendants who were engaged in interstate commerce of the assets of Consolidated which was engaged in interstate commerce, was admittedly for the "competitive advantages" that Defendants would "all share mutually". [R. 614.] It follows, therefore, that the acquisition was a violation of Section 18 of Title 15 U. S. C.

Even were legal advertising not interstate commerce itself, or not an integral part of the interstate business of publishing newspapers, we have a situation where the Defendants, admittedly engaged in interstate commerce, were able to use the profits made in their interstate activities to underwrite their war with Consolidated. Hence, under the decision of this Court in *Moore v. Mead's Fine Bread Company*, 348 U. S. 115, Congress has the power to prevent the Defendants from using the instrumentality of their interstate commerce business to destroy Consolidated.

## III.

## The Court of Appeals so Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision, Particularly Since Said Departure Resulted in the Denial of Petitioner's Right to a Jury Trial.

The judgment of the Trial Court resulted from the Defendants' Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Hence, if there was a genuine issue as to a material fact, the judgment should have been reversed. The Court of Appeals, however, stated:

> "We . . . conclude that the parties have in effect consented to a separate trial on the issue of jurisdiction . . . Hence, this opinion will concern itself with the correctness of the legal test applied by the District Court to the Findings of Fact made by it." (Appendix B, pp. 10-11.)

The Court of Appeals then goes on in three different places to treat the Trial Court's finding as if it were deciding a case on appeal after a trial on the merits. (Appendix B, p. 10, lines 2 and 3, p. 14, lines 3 and 4, p. 14, lines 19 and 20. Petitioner filed a Petition for Rehearing in the Circuit Court on April 6, 1961 [Supp. R.] and on May 3, 1961, the Circuit Court rendered its Opinion denying said rehearing wherein it stated:

> "We have reread the voluminous record in this case and concede that we may have been in error in holding that Appellant, in effect, consented to a separate trial before the Court on the separate issue of jurisdiction. This conclusion, however, does not require a reversal of the judgment." (Appendix C, p. 30.)

The Court of Appeals does not, however, correct the fallacy of its original decision of March 8, 1961. That decision recognized the existence of issues of fact but held that the Trial Court's Findings of Fact were not erroneous. This was but another way of saying that genuine issues of fact existed in which event the Court of Appeals should have reversed the District Court's judgment. *Rule 56 Federal Rules of Civil Procedure.*

The effect of the Court of Appeals' treatment of the case is to deny to Petitioner her constitutional right to a jury trial guaranteed by the VII Amendment of the Constitution of the United States. This constitutional right was denied for the first time upon the rendition of the Opinion of the Court of Appeals on March 8, 1961, and Petitioner had her first opportunity to raise the constitutional question in her Petition for Rehearing which she did at pages 5 through 18, inclusive thereof. [Supp. R.]

## Conclusions.

"The proper disposition of antitrust cases is obviously of great public importance." *United States v. DuPont de Nemours & Co.*, 6 L. Ed. 2d 318 at page 323. The public interest compels a granting of this Petition. The Ninth Circuit has a propensity to ignore the clear mandate of this Court in the antitrust field and has done so again in this case. In addition the Court of Appeals denied Petitioner's right to a jury trial by departing from the accepted and usual course of judicial proceedings by treating Petitioner's appeal

from a judgment granting Defendants' Motion for Summary Judgment as if it were an appeal from a trial on the merits of the jurisdictional issue when in fact it was not.

Respectfully submitted,

DUDLEY K. WRIGHT,
*Attorney for Petitioner.*

## APPENDIX A.

### Opinion of the United States District Court, Southern District of California, Central Division.

United States District Court, Southern District of California, Central Division.

No. 14390-WM Civil.

C. A. Page Publishing Co., Inc., a California corporation, Plaintiff, vs. Telford Work, *et al.*, Defendants.

No. 14391-WM Civil.

Marietta Page, Plaintiff, vs. Telford Work, *et al.*, Defendants.

Solomon, Judge:

Each case is now before the court on plaintiffs' motions for partial summary judgment, and on defendants' motions for summary judgment; each motion is directed to the issue of jurisdiction under the Sherman and Clayton Acts. Both cases raise the identical jurisdictional issues, and are treated together. The court has taken testimony in addition to the [328] affidavits of counsel, and the parties are in agreement that all evidence relative to the jurisdictional issue is now before the court.

Plaintiff C. A. Page Publishing Company owns and publishes the Commercial News, a general business newspaper serving the Los Angeles area.

Defendants are a number of community newspapers serving small neighborhoods in and around Los Angeles and the Los Angeles Newspaper Service Bureau together with several of its officers. The Bureau

is owned substantially by the defendant newspapers and represents them in the solicitation of legal advertising.

Plaintiff seeks treble damages under the Sherman and Clayton Acts.[1] It claims that collusive and illegal bidding by defendants caused the Commercial News to lose printing contracts for the 1951 and 1954 Los Angeles delinquent tax lists. More particularly, plaintiff contends that defendant newspapers

(1) fixed rates for legal advertising published in their newspapers,

(2) appointed Telford Work to submit collusive and illegal bids,

(3) pooled forces and facilities to print and publish legal advertising so as to be in a position to outbid on public legal advertising all publishers who were not members of the Bureau,

(4) pooled receipts,

(5) sought to restrain the general public from [329] placing legal advertising with non-member newspapers,

(6) sought by threats, intimidation, and duress to destroy non-member newspapers,

(7) divided the market territorially among its members,

(8) placed prohibitive restrictions on new membership,

(9) bought out various non-member newspapers,

(10) succeeded in effectively eliminating competition by non-member newspapers in the publishing of legal advertising.

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[1] 15 U.S.C. §§ 1, 2, 4, 13, 15, 18 and 26.

Plaintiff contends that these activities enabled one of the defendant newspapers to obtain the contract to publish the Los Angeles delinquent tax list on bids of $52,000 in 1951, and $70,000 in 1954, as against plaintiff's bids of $109,000 in 1951 and $120,000 in 1954. Plaintiff estimates that its costs in printing the lists, had it been the successful bidder, would not have exceeded $24,000 for either list. Thus, it seeks over a half million dollars in damages, representing three times its estimated net profit of $85,000 in 1951, and $96,000 in 1954.

In the companion case, consolidated for trial, plaintiff Marietta Page brings a stockholder derivative action on behalf of Consolidated Printing and Publishing Company, the former publisher of the Los Angeles Daily Journal, a newspaper primarily engaged in the publication of legal advertising for the Los Angeles area.

She alleges that defendant newspapers sought to destroy the Journal, a non-member of the Bureau, and by their [330] activities impaired the revenues of the Journal so severely that the owners of Consolidated were forced to sell out for one million dollars less than the former value of the Journal. Thus, plaintiff seeks, for Consolidated, $3,000,000, treble its alleged loss.

Plaintiffs argue that a newspaper is by its nature engaged in interstate commerce, and therefore acts which interfere with the normal operation of a newspaper business necessarily affect interstate commerce sufficiently to satisfy the jurisdictional requirements of the Sherman and Clayton Acts.

We may assume that the plaintiff and defendant newspapers are engaged in interstate commerce by vir-

tue of (1) their regular purchases of newsprint from sources outside of California, (2) their carriage of some national news and feature items, (3) their carriage of some national advertising, and (4) a few out-of-state subscribers.

However, the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the offensive acts affect the interstate commerce of such business or any business. Furthermore, it is not all economic consequences to interstate commerce which confer jurisdiction but only those anti-competitive consequences which the statutes are designed to prevent.[2]

This principle was very well expressed in Mandeville Farms v. Sugar Co., 1947, 334 U. S. 219, 234, where the court stated:

"[G]iven a restraint of the type forbidden by the Act * * * and a showing of actual or threatened effect upon interstate commerce, the vital question be-

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[2]"The word 'affect' is used in two different situations under the antitrust laws. A case under the antitrust laws, so far as the interstate commerce element is concerned may rest on one or both of two theories:

(1) That the acts complained of, occurred within the flow of interstate commerce. This is generally referred to as the 'in commerce' theory.

(2) That the acts complained of, occurred wholly on the state or local level, in intrastate commerce, but substantially affected interstate commerce.

"Under both of these theories, the transactions complained of must affect or have an effect on interstate commerce or the requirements of the statute are not satisfied. Under the 'in commerce' theory, the ultimate effect on interstate commerce is the impact on that commerce under a qualitative and not a quantitative test. If there is price fixing or division of the market involved, there are violations per se, as a matter of law. Where there is involved no price fixing or division of the market, the

comes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence."

In Sears, Roebuck & Company v. Blade, S. D. Cal. 1953, 110 F. Supp. 96, Sears brought a treble damages action against its former Los Angeles advertising manager and several local engravers, arising out of an alleged kick-back arrangement between the manager and his co-defendants in the sale to Sears of engravings and mats.

Ample facts appeared to qualify Sears as a business engaged in interstate commerce, and the court so found. Nevertheless, the court dismissed the action on the express ground that the acts complained of were not alleged to have restrained or have tended to restrain these interstate activities in which Sears was engaged. Accord, Feddersen Motors v. Ward, 10 Cir. 1950, 180 F. 2d 519, Boro Hall Corp. v. General Motors, 2 Cir. 1946, 130 F. 2d 196, on rehearing. See also Brenner v. Texas Co., D. C. N. D. Cal. 1956, 140 F. Supp. 240, 243.

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effect of the transactions complained of may be a question of law or a mixed question of law and fact.

"Turning to the second alternative, where acts wholly within intrastate commerce substantially affect interstate commerce, these acts may occur before goods enter the flow of commerce, or after they leave the flow of commerce. Here we have a question of fact as to whether the wholly intrastate acts substantially affect the flow of commerce.

"After determination of the issue as to whether the wholly intrastate acts substantially affect the flow of commerce, we then reach the same problem that is reached under the 'in commerce' theory, namely the ultimate effect or impact of the acts complained of on interstate commerce and again the test is a qualitative one and not a quantitative test, and again is a question of law, or a mixed question of law and fact." Las Vegas Merchant Plumbers Ass'n v. United States, 9 Cir. 1954, 210 F. 2d 732, 739, n.3. [332]

In every case cited by plaintiff involving news media, a defendant had restrained, or attempted to restrain, competition in the interstate market for national news and advertising. Lorrain Journal v. United States, 342 U. S. 143 (1951); Farmers Guide Co. v. Prairie Co., 293 U. S. 268 (1943); Greenspun v. McCarran, D. C. Nev. 1952, 105 F. Supp. 662, and United States v. The Times-Picayune Publishing Co., D. C. E. D. La. 1952, 105 F. Supp. 670.

In each of these cases, newspapers, enjoying dominant positions in local or regional newspaper markets, utilized various methods outlawed by the Sherman Act, to draw advertising from competing news media, in order to drive competitors out of business and to monopolize local markets for interstate news and advertising.

In Evening News Publishing Co. v. Allied Newspaper Carriers of N. J., 3 Cir. 1959, 263 F. 2d 715, an association of newspaper carriers utilized its dominant position of the home delivery market to force the Evening News to abandon [333] the use of newsboys in order to restrain and monpolize home deliveries of the News. The court held that the dissemination of national news and advertising was "an essential element of [the newspaper's] being", and that home delivery is "an integral part of the interstate operation".

In the present case, the loss of the delinquent tax list contracts was not alleged to have threatened the normal operation of the Commercial News—a newspaper of general circulation neither primarily devoted to, nor economically dependent upon legal advertising. Thus, although the Commercial News carried substantial

amounts of national news and display advertising, there was no interference with the flow of such news and advertising to Commercial News readers. On the other hand, the Los Angeles Daily Journal, which is primarily devoted to legal advertising, carried insignificant quantities of national news and display advertising, so that even if we assume that the original Journal was eliminated as a competitor and the current Journal is a new and distinct entity, the elimination of the Journal also did not interfere with the flow of national news and display advertising.

Furthermore, even if the original Journal had carried substantial news and advertising and even if the Commercial News had been destroyed by defendants' activities, no showing could have been made that the defendants had any control or potential control over the interstate markets for newsprint, national display advertising, or the dissemination of national news. This is no case of creeping monopolization. Klors v. Broadway-Hale Stores, 1959, 359 U. S. 207. Plaintiffs [334] assert that the defendant newspapers were able to destroy the Journal by the exercise of control over the local legal advertising market. But this control could afford them no leverage to gain control of the interstate markets in newsprint, national news, or national display advertising, no matter how successful their monopoly of the legal advertising market, since the major users of these interstate services and commodities, such as the great metropolitan dailies, are not dependent upon the revenues brought by legal advertising.

If there existed an appreciable interstate market for Los Angeles legal advertising or a Los Angeles market for legal advertisements placed by out-of-state clients,

a case might be made out for the anti-competitive effects of defendants' activities on these markets. No such markets exist. The Journal is the only newspaper involved which is primarily devoted to legal advertising. It is the only newspaper involved whose out-of-state readers are particularly interested in legal advertising. The Journal has only 13 out-of-state subscribers, three of whom are complimentary. Similarly, legal advertisements for out-of-state clients appeared in the Journal regularly, though on a very small scale (averaging 5 items per issue), and a great majority of these items were placed by local counsel. These are not "substantial" or "appreciable" amounts of interstate commerce by any standards, and we hold that these items also come within the maxim de minimus. See, *e.g.,* Klors v. Broadway-Hale Stores, *supra,* at 211; Mandeville Farms v. Sugar Co., *supra,* at 234; United States v. Yellow Cab Co., 1946, 332 U. S. 218, 225. Cf. Mabee v. White Plains Publishing Co., 1945, [335] 327 U. S. 178, 181; Labor Board v. Fainblatt, 1938, 306 U. S. 601, 607.

Plaintiffs' motions for partial summary judgments are denied, and defendants' motions for summary judgments are granted. Both cases are dismissed. No costs. [336.]

[Endorsed]: Filed October 23, 1959.

## APPENDIX B.

United States Court of Appeals for the Ninth Circuit. Marietta Page, Appellant, v. Telford Work et al., Appellees. No. 16,787. March 8, 1961.

Appeal from the United States District Court for the Southern District of California, Central Division. Before Chambers, Barnes and Jertberg, Circuit Judges. Jertberg, Circuit Judge.

Appellant appeals from a judgment dismissing for want of federal jurisdiction a civil antitrust action for treble damages. Jurisdiction of the district court was invoked under the provisions of Title 15 U. S. C. A. Sections 1, 2, 4, 7, 13, 15 and 18, commonly known as the Sherman Antitrust Act and the Clayton Act. This Court has jurisdiction under the provisions of Title 28 U. S. C. A. Sections 1291 and 1294.

Judgment of dismissal was entered following the granting by the District Court of Appellees' motion for summary judgment based on the ground that there existed no genuine issue on a material fact relating to the question of jurisdiction. To denominate the proceedings leading up to the entry of judgment of dismissal as a motion for summary judgment is somewhat of a misnomer in the light of the record in this case. Following extensive pretrial discovery proceedings and conferences, culminating in a pretrial conference order containing 30 pages of admitted facts, the case was set for trial on its merits. "On the day before the trial date the district court inquired of counsel if they were agreeable to submitting the question of jurisdiction on motions for summary judgment. In response to the court's inquiry, counsel for both parties stated that they

would be perfectly willing to do so." On the same date oral testimony was taken on one phase of such issue. Thereafter appellees filed their motion for summary judgment on the ground above stated, and appellant filed a motion for partial summary judgment in her favor on the issue of federal jurisdiction. The respective motions were supported by affidavits, stipulated facts, answer to requests for admissions and interrogatories, depositions, exhibits, excerpts from exhibits, and the oral testimony. Following the filing of the motions and briefs and the submission of the issue, the district court stated that the case was before the court on appellee's motion for summary judgment and on appellant's motion for partial summary judgment; that each motion is directed to the issue of jurisdiction under the Sherman and Clayton Acts, and stated, "The court has taken testimony in addition to the affidavits of counsel, and the parties are in agreement that all evidence relevant to the jurisdictional issue is now before the court."

We are satisfied from the record that all evidence germane to the question of jurisdiction was before the court. The parties appear likewise satisfied since on this appeal appellant does not contend that summary judgment was improper because of the presence of a genuine issue as to a material fact. Each party argues that under the facts before the trial court each is entitled to a judgment as a matter of law on the issue of jurisdiction. We, therefore, conclude that the parties have in effect consented to a separate trial on the issue of jurisdiction. See Gillespie v. Norris, (9th Cir., 1956), 231 F. 2d 881. We note that the trial court in proper circumstances has the right to order separate

trials for separate issues in the same case. Federal Rules of Civil Procedure 42(b). Hence this opinion will concern itself with the correctness of the legal tests applied by the district court to the findings of fact made by it.

The action is on behalf of Consolidated Printing and Publishing Company, a dissolved corporation (hereinafter referred to as "Consolidated"), as a derivative stockholder's suit. Prior to its dissolution on May 29, 1951, Consolidated was the owner and publisher of the Los Angeles Daily Journal, a newspaper primarily engaged in the publication of legal advertising in the Los Angeles area. Violations of the antitrust law are charged against the appellees, and more particularly appellant contends:

(1) That appellees formed the Los Angeles Newspaper Service Bureau, a California corporation;

(2) That the Bureau fixed prices for public and private legal advertising in Los Angeles County;

(3) That an agent was appointed who submitted collusive bids on public advertising;

(4) That the Bureau members pooled forces and facilities to print public advertising, and excluded nonmembers from participation in those projects;

(5) That Bureau members pooled receipts derived from legal advertising;

(6) That the Bureau endeavored to prevent the general public from placing legal advertising with newspapers not members of the alleged conspiracy;

(7) That the Bureau endeavored to destroy nonmembers by threats, intimidation and duress;

(8) That the Bureau acquired stock and assets of various non-members;

(9) That the Bureau, by various other means not specified, eliminated competition in the field of public and private advertising in Los Angeles County; and

(10) The Bureau divided the market territorially among its members and excluded non-members and excluded one member from the territory of another member.

It is appellant's contention that appellee newspapers sought to destroy the Journal, not a member of the Bureau, and by their activities impaired the revenues of the Journal so severely that Consolidated was forced to dissolve and the stockholders thereof were forced to sell the assets of the Journal for $1,050,000 less than the former value of the Journal. Appellant seeks treble such amount.

Before proceeding further we will review the necessary background and historical material. The gist of appellant's charges is that the appellees combined and conspired to eliminate the Los Angeles Journal as a competitor in the field of legal advertising in the County of Los Angeles, and to monopolize such market, and did not monopolize such market. Legal advertising consists of notices required by California law to be published in newspapers of general circulation within the State of California. Legal advertising is divided into two basic categories: (a) public legal advertising, which consists of notices placed by federal, state, county, city, school district, or other governmental divisions to be published in such newspapers; (b) private legal advertising which consists of notices required by law

or agencies which are required by law to cause notices to be published in connection with the conduct of business within the state or in connection with the court or other proceedings pending in the state. In order to qualify under California law to publish legal notices, a newspaper must be a newspaper of general circulation as defined by law. California law requires that such newspaper must be established, printed and published at regular intervals for at least one year in the place where publication is required, and must be adjudicated to be a newspaper of general circulation. The basic purpose of laws requiring publication of legal notices is to have such notices published in the place where it is most likely that they will be read by the persons who might be concerned. Accordingly places of publication of legal notices are often expressly localized by statute, in a court decree, or action of public officials who are responsible for publication.

In the early 1930s Consolidated dominated the legal advertising market in the County of Los Angeles, and had achieved a virtual monopoly of such market. The metropolitan newspapers of the City of Los Angeles, such as the Los Angeles Times, the Los Angeles Examiner, and the Los Angeles Express, were not interested in this field of legal advertising, but a number of small newspapers of general circulation, printed and published in the smaller cities and neighborhood areas within the County of Los Angeles, were interested in participating in this field. Representatives of some of the appellee newspapers called upon officials of the city of Los Angeles and of the County of Los Angeles and sought to participate in the public legal advertising required to be printed by such officials in Los Angeles

newspapers. They were advised that it was not feasible for these public officials to deal with a large number of newspapers scattered throughout the City and County of Los Angeles, and that the administrative duties of dealing separately with so many small newspapers was too burdensome. To meet the problem raised by such public officials, and in order to enable small newspaper publishers throughout the County of Los Angeles to compete in this field, some of the appellees caused to be formed in 1934 the Los Angeles Newspaper Service Bureau, a California corporation, (hereinafter referred to as the "Bureau"), in order to enable each newspaper publisher to have a downtown civic center representative, who was authorized to solicit on behalf of appellee newspapers public legal advertising from public officials in Los Angeles County. Each of the appellee newspapers individually used the services of the Bureau under a separate agreement for the solicitation and servicing of private and public legal advertising published in the respective newspaper of each appellee newspaper. Each member of the Bureau was an independent newspaper establishment, and each operated primarily in a local city or neighborhood within the City and within the County of Los Angeles. The subscription list of each such newspaper was drawn primarily from the circulation area in the respective community of the paper. The Bureau also rendered various other types of services for each publisher, such as furnishing information concerning various requirements for publication, customary rates charged for particular types of publication, guidance in the matter of forms to be executed by the publisher in proof of publication, and furnishing forms of busi-

ness notices to be used in the sale of legal advertising, and instructing and advising on various problems affecting the publication of legal advertising. The Bureau assisted publishers in soliciting of lawyers, title companies, escrow departments, court commissioners, and others who publish legal notices in local newspapers most likely to be seen by the persons affected by such notices, and assisting the publishers in competing for such business. The Bureau from the time of its formation was active in fostering the principle of localization of publication of both private and public legal notices, and representatives of the Bureau frequently appeared before various public officials and legislative bodies constantly seeking greater localization of the publication of legal notices. The record discloses that the efforts of the Bureau to secure greater localization of publication of legal notices were successful.

As a result of the greater localization of publication, the Los Angeles Journal, which was printed and published in the Los Angeles judicial district, became ineligible to compete for the publication of legal notices which were required to be printed and published in some other district, city, or political subdivision of the City of Los Angeles or the County of Los Angeles, although remaining eligible to compete where the notice was required to be printed and published in a newspaper of general circulation within the Los Angeles judicial district. As a result of the foregoing and other activities of the Bureau, it is charged that the revenues of Consolidated from the Los Angeles Journal became so impaired that by 1951 Consolidated was forced to dissolve and the stockholders were forced to sell the assets of the Journal. These assets of the

Journal were purchased from the stockholders of Consolidated by Mutual Newspaper Publishing Company, a corporation (hereinafter referred to as "Mutual"), which has continued the publication of the Los Angeles Daily Journal. The Bureau, and its subsidiary corporation Mutual, are owned substantially by the appellee newspaper publishers.

The appellees are: the owners and publishers of 105 community newspapers serving areas in Los Angeles County, each of whom is and was a member of the Bureau at the time of the filing of the original complaint; the Bureau; Mutual; several officers of said corporations; Consolidated; and stockholders and former directors of Consolidated. Appellant seeks no affirmative relief against Consolidated or its stockholders and directors. Each appellee newspaper is a newspaper of general circulation as defined by California law, and therefore qualified to publish legal notices. Each appellee newspaper is printed and published in one of the cities or neighborhood areas of the County of Los Angeles, and carries primarily news and classified and display advertising. The lineage used in legal advertising in appellee newspapers constitutes a small percentage of the lineage devoted to display and classified advertising. Legal notices required to be published elsewhere than in Los Angeles County are, of course, not published by any of the newspapers herein concerned. The solicitation in Los Angeles County of legal notices for publication outside of California is negligible, and appellant makes no contention that competition in such market has in any way been affected by any of the activities of appellees. The Los Angeles Daily Journal carried only a small amount of display or classified

advertising, and its circulation consisted largely of lawyers in Los Angeles County, title companies, escrow companies, and other firms having a need of information concerning court calendars, court filings, and commercial information.

Appellant makes no claim that any activity of appellee caused the Los Angeles Daily Journal to lose subscribers, to lose display or classified advertising, or to lose job printing. Appellant claims loss of revenue to Consolidated only in the field of legal advertising. Appellant makes no contention that competition existed between Consolidated and the appellees in the field of news dissemination or in the field of display and classified advertising. Its sole contention in this regard is that competition existed only in the field of legal advertising.

The record is clear that appellee newspapers and Consolidated were engaged in interstate commerce by virtue of (1) their regular purchases of newsprint and other supplies from sources outside of California; (2) the dissemination of national news; (3) their carrying of national advertising; and (4) a few out-of-state subscribers. The Bureau did not engage in purchasing newsprint or supplies for use of its members, nor did it engage in the printing or publishing of any newspaper. There is no contention on the part of appellant that appellees in any way attempted to monopolize, curtail, interfere with, or affect the movement to Consolidated of any of these out-of-state articles or services.

The facts found by the district court are:

"7. Defendant newspapers engage in interstate commerce by virtue of (1) their regular purchases of news-

print from sources outside of California, (2) their carriage of some national news feature items, (3) their carriage of some national advertising, and (4) a few out-of-state subscribers.

"8. Consolidated engaged in interstate commerce by virtue of (1) regular purchases of newsprint from sources outside of California, (2) a few out-of-state subscribers. The Los Angeles Daily Journal, primarily devoted to legal advertising, carried insignificant quantities of national news and display advertising.

"9. Even if Consolidated, former owner of the Los Angeles Daily Journal, had been eliminated as a competitor by reason of the activities of defendants in relation to legal advertising, such elimination of Consolidated as a competitor, would not have interfered with the flow of national news and display advertising in interstate commerce.

"10. No showing was, or could have been made, that the defendants had any control or potential control over the interstate markets for newsprint, national display advertising, or the dissemination of national news.

"11. This is no case of creeping monopolization of any interstate market.

"12. Plaintiff claims that defendant newspapers were able to destroy the Los Angeles Daily Journal by the exercise of control over the local legal advertising market. Such control of the local legal advertising market could afford defendants no leverage to gain control of the interstate markets in newsprint, national news, or national display advertising, no matter how successful a monopoly could be gained of the legal

advertising market, since the major users of those interstate services and commodities, such as the great metropolitan dailies in the Los Angeles area, are not dependent upon revenue brought by legal advertising.

"13. No appreciable interstate market exists either for Los Angeles legal advertising or for legal advertisements in Los Angeles placed by out-of-state clients. No such interstate markets exist.

"14. The Los Angeles Daily Journal is the only newspaper involved which is primarily devoted to legal advertising. It is the only newspaper involved whose out-of-state readers are particularly interested in legal advertising. It has only 13 out-of-state subscribers, three of whom are complimentary. Legal advertisements for out-of-state clients appeared in the Journal regularly, though on a very small scale (average 5 items per issue), and a great majority of these items were placed by local counsel. These are not 'substantial' or 'Appreciable' amounts of interstate commerce by any standards, and come within the maxim *de minimis*."

From the findings of fact the district court concluded:

"1. There is no genuine issue as to any of the foregoing facts which are determinative of the cause.

2. The market involved in the instant case is an intrastate activity which is not in trade or commerce between the states.

3. The interstate trade or commerce in which plaintiff and defendants engage did not suffer any anti-competitive effects from the acts of defendants of which plaintiff complains.

4. The activities of defendants with relation to legal advertising did not have any anti-competitive effect on any interstate market.

5. There is no jurisdiction of the Federal Court in this case under the antitrust laws.

6. Defendants are entitled to a summary judgment dismissing this action, and Judgment should be entered accordingly."

It is clear from the facts submitted to the district court, and as reflected in the opinion of the district court, C. A. Page Publishing Co. v. Work, 178 F. Supp. 184, and in the findings of fact and conclusions of law, that the product involved in this action is legal advertising in newspapers printed, published and circulated in Los Angeles County, and that the pertinent market in which the parties competed for such product is Los Angeles County.

The district court found that no interstate market exists for legal advertising in newspapers printed, published and circulated in Los Angeles County. The printing and publication of legal notices is limited by law, court decree, or the action of public officials, to newspapers of general circulation printed and published in Los Angeles County. The claimed restraints applied by appellee newspapers and their activities to monopolize or attempt to monopolize the product involved were on a purely local level and were wholly directed to local intrastate market. The finding of the district court is not erroneous, and the court properly concluded that the product involved is not in the flow of interstate commerce.

Appellant's main contention is that the trial court erred in respect to the above finding and above conclusion of the district court. It is appellant's position that the business of printing and publishing newspapers is interstate because newsprint, ink, and other supplies, news items, and advertisements received from outside California become the ingredients, together with local news and local legal and other advertisements, of the newspaper which is printed and published in Los Angeles County and circulated in and out of the State of California, and that legal advertising being an integral part of such newspaper is in the flow of commerce. Even granting the doubtful proposition that a process requiring fundamental and numerous changes in the nature of the product can constitute an uninterrupted flow, appellant's view of the flow of commerce relates to the newspaper business as a whole rather than the relevant market with which we are concerned, which is separate and divisible from other markets in which a newspaper may be engaged. In the antitrust field a relevant market may be narrower than the entire business operation of the business under scrutiny. Thus, the Supreme Court has confined the relevant market of products (flexible packaging materials) of a large enterprise, United States v. E. I. du Pont de Nemours & Co., (1956), 351 U. S. 377. A relevant market has been defined as championship boxing matches, as distinguished from other boxing matches, International Boxing Club v. United States (1958), 358 U. S. 424; gospel music as distinguished from other music, Affiliated Music Enterprises, Inc. v. SESAC Inc. (2d Cir. 1958), 160 F. Supp. 865, affirmed 268 F. 2d 13; newspaper advertising as distinguished from circulation, Times-Picayune v. United States (1953), 345

U. S. 594. In United States v. Yellow Cab Co. (1947), 332 U. S. 218, the Supreme Court held that the Yellow Cab was engaged in interstate commerce in transporting passengers from one railroad station in Chicago to another because of the unique position of Chicago as a terminus for interstate travelers, but the Court also held that the transportation by Yellow Cab from homes in the Chicago area to the railroad station was not in interstate commerce, as the impact of this transportation on interstate commerce was too indirect and fortuitous. The test of jurisdiction is not that the acts complained of affect business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.

Appellant makes the argument that the newspaper cases constitute an exception to this general rule. Appellant contends that the newspaper cases seem to lay down a simple rule that if a newspaper is engaged in interstate commerce it is entitled to the protection of the antitrust laws no matter where the particular restraint is applied.

A review of the leading antitrust cases in the newspaper field shows no such uniform rule according newspapers special treatment under the antitrust laws. In Times-Picayune Co. v. United States, *supra*, the Supreme Court held that a unit rate plan for commercial advertising in morning and evening newspapers was not invalid under the antitrust laws as a tying agreement, reversing the lower court. The Court considered the position of defendant in the relevant commercial advertising market and carefully restricts its holding to the facts.

In Lorain Journal v. United States (1951), 342 U. S. 143, the Supreme Court found a restraint in inter-

state trade when the publisher of the only daily newspaper in one community refused to accept advertising from anyone who advertised on a radio station in a neighboring community, finding that the effect of this practice would be to put the radio station, an interstate broadcaster, out of business. In Greenspun v. McCarran (1952), (District Court of Nevada), 105 F. Supp. 662, concerted withdrawals of advertising by large gambling establishments from one of two Las Vegas newspapers of interstate circulation was held to be a restraint of interstate commerce as an attempt to put one newspaper out of business. In Evening Newspaper Publishing Co. v. Allied Newspaper Carriers (3d Cir., 1959), 263 F. 2d 715, a refusal by delivery dealers to handle any of plaintiff's newspapers unless plaintiff ceased using newsboys for home delivery was held to be a restraint of trade affecting interstate commerce, because it interfered with the interstate business of news and commercial advertising dissemination. In all the above cases a restraint of interstate commerce was found which was determinative of federal jurisdiction. In none of the above cases did the Court hold, as appellant contends, that the interstate character of the newspaper business as a whole was the determining factor for federal jurisdiction.

Appellant contends that the district court erred in failing to take into consideration appellant's contentions that appellee newspapers engaged in price fixing and market divisions, which constitute per se violations of Section 1 of the Sherman Act, citing among other cases, United v. Socony Vacuum Co., (1940), 310 U. S. 150; and International Salt Co. v. United States, (1947), 332 U. S. 392. Appellant argues that when

charges of price fixing and territorial division of a market exist at a local level on a product which never enters the flow of interstate commerce, nevertheless, a per se violation of Section 1 has been made out and that federal jurisdiction attaches, and that the amount of interstate commerce affected by such restraints is immaterial. The so-called qualitative test of the illegal per se doctrine does not itself operate to extend federal jurisdiction under Sections 1 and 2 to purely local restraints applied at a local level to a product which never enters into the flow of interstate commerce. The argument made here by appellant has been squarely rejected by this Court in Las Vegas Merchant Plumbers Assn. v. United States, (9th Cir., 1954), 210 F. 2d 732, where this Court said:

"True, a price fixing conspiracy which operates on or within the flow of interstate commerce affects this commerce as a matter of law. But a price fixing conspiracy at a purely local level does not as a matter of law affect the flow of commerce. Whether a purely local or intrastate conspiracy unreasonably restrains commerce is primarily a factual question, *i.e.*, does the local price fixing conspiracy affect substantially the flow of interstate commerce. If the answer is yes, then only are we concerned with the effect of price fixing under the per se doctrine. In fact, unless there is a finding that the local and intrastate activities complained of and as alleged in the indictment [complaint] substantially affect interstate commerce, there is no jurisdiction in a district court over the alleged Sherman Act violation."

There remains the question of whether the intrastate activity of publishing legal notices affects interstate

commerce even though it is not in the flow of commerce. It is clear that some wholly local activities by parties neither of whom engage in interstate commerce may nevertheless affect interstate commerce. White Bear Theater Corp. v. State Theater Corp., (8th Cir., 1942), 129 F. 2d 600. "If it is interstate commerce that feels the pinch it does not matter how local the operation which applies the squeeze." United States v. Women's Sportswear Assn. (1949), 336 U. S. 460.

However, despite the increased thrust of federal commerce power as business operations become more interrelated and complex, the courts have consistently required that in order for federal antitrust jurisdiction to be sustained the effect on interstate commerce of an alleged antitrust violation in a local area must be direct and substantial, and not merely inconsequential, remote or fortuitous. Mandeville Farms v. Sugar Co., (1948), 334 U. S. 219; Foster & Kleiser Co. v. Special Site Sign Co., (9th Cir., 1936), 85 F. 2d 742; Atlantic Co. v. Citizens Ice & Cold Storage Co., (10th Cir., 1949), 178 F. 2d 452; Spears Free Clinic & Hospital v. Cleere, (10th Cir., 1952), 197 F. 2d 125; Elizabeth Hospital v. Richardson, (8th Cir., 1959), 269 F. 2d 167, cert. denied 361 U. S. 884.

Appellant contends that there was direct and substantial injury to the interstate newsprint market. The argument that the newsprint market suffered because Consolidated ceased buying newsprint when it went out of business is not convincing. There is no indication that Mutual, operating the same newspaper, purchased any less newsprint from out of state. Appellees were in no position to or did restrict competition in the newsprint market. Uncontested facts show that the

Bureau did not purchase newsprint for its members, and there was no evidence that appellees did anything to interfere with newsprint purchases by Consolidated. Newsprint is only one of many ingredients in a newspaper, which is a separate product from the ingredients of which it is composed. Newsprint is not the product involved in this case.

The district judge found that control of the product of legal advertising in the relevant market offered no foothold to appellees to gain control of the interstate markets in national display advertising, news dissemination or newsprint, since the chief competitors in these products—metropolitan newspapers—did not depend on publication of legal notices for revenue. This finding is not clearly erroneous. This case is unlike Lorain Journal v. United States, *supra,* or Greenspun v. McCarran, *supra,* in which dominance in the local commercial advertising market was used to cut off the revenue of a competitor, driving him out of an interstate business. Commercial advertising is not involved in this case. The commercial advertising market is so different that it cannot be analogized to the publication of legal notices. In the field of legal advertising the advertiser—be it a public official or private person—is in an entirely different situation as were private advertisers in the Lorain Journal and the Greenspun cases. Public authority determines when, where and how legal notices will be published. In the absence of evidence to the contrary it must be presumed that public power has been properly exercised.

Appellant contends that appellees restrained competition in interstate circulation. The trial judge concluded that 13 out of 4000 subscribers, three complimentary,

is de minimis. We find nothing to indicate that this finding is clearly erroneous. None of the activities of appellees made information contained in the Los Angeles Daily Journal unavailable to these 13 subscribers. Prior to the dissolution of Consolidated appellees did nothing to restrict the out-of-state circulation of the Journal.

In our view the district court properly concluded that the effect of the activities of appellee newspapers in the local market on those interstate activities in which Consolidated and appellees were also engaged were indirect and non-existent, and no substantial effects were felt in the interstate markets of newsprint purchase, national and display advertising, national news dissemination and circulation.

We agree with the statement of the district court that this is no case of creeping monopolization. See Klor's v. Broadway Hale Stores, (1959), 359 U. S. 207, and Radiant Burners, Inc., Petitioner, v. People's Gas Light & Coke Company, et al., decided January 16, 1961, — U. S. —.

Appellant states that "Even were defendants' activities not a violation of Sections 1 and 2 of Title 15 U. S. C., Plaintiff on behalf of Consolidated can recover for the injury caused by defendants' clear violation of Section 18 of Title 15 U. S. C." Appellant complains that the trial court did not even consider the Section 18 aspect of the case. Section 18 in applicable parts is as follows:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another

corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

* * *

Title 15 U. S. C. A. Section 18.

It is to be noted that the plain language of the statute is to prohibit the acquisition by one corporation of the capital stock or assets of another corporation, "where in any line of *commerce in any section of the country*, the effect of such acquisition * * * may be substantially to lessen competition, or to tend to create a monopoly." (Italics added) The purpose in the enactment of Section 18 was to cope with monopolistic tendencies in their incipiency, which were beyond the reach of the Sherman Act as judicially interpreted. See American Crystal Sugar Co. v. Cuban-American S. Co., 259 F. 2d 524, and also the Report of the Attorney Generals' National Committee to Study the Antitrust Laws, March 31, 1955, page 115 *et seq.* We recognize that the general language of the Sherman Act and of the Clayton Act was designed by Congress

to exercise its powers under the Commerce Clause of the Constitution to the fullest extent, nevertheless, it must be interstate commerce which feels the pinch, or competition in interstate commerce which may be substantially lessened, or where there is a tendency toward the creation of a monopoly in interstate commerce, before the provisions of said sections become applicable.

In our view, the language of Section 18 in no way indicates that Congress intended to apply the provisions of that Act to purely local activities wholly directed to a local intrastate market and relating to a product not in the flow of interstate commerce and where the effects on interstate activities in which the parties engage are insubstantial, inconsequential and fortuitous, if not non-existent.

The judgment of the district court is affirmed.

(Endorsed) Opinion Filed March 8, 1961.

Frank H. Schmid, Clerk.

## APPENDIX C.

### On Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Before Chambers, Barnes and Jertberg, Circuit Judges.

*Per Curiam:*

An opinion was filed herein on March 8, 1961, .... F. 2d ...., affirming the judgment of the district court dismissing for want of federal jurisdiction a civil anti-trust action.

On petition for rehearing, appellant asserts that we erred in our characterization of the procedural issues on appeal and in respect to the application of the rules of law stated in our opinion. We have reread the voluminous record in this case and concede that we may have been in error in holding that appellant, in effect, consented to a separate trial before the court on the separated issue of jurisdiction. This conclusion, however, does not require a reversal of the judgment.

Appellees made a timely motion for a summary judgment on the issue of jurisdiction. If the district court correctly concluded that appellees were entitled to a summary judgment, appellant cannot complain of the deprivation of a jury trial. Fidelity & Deposit Co. of Maryland v. United States, (1902), 187 U. S. 315; Lindsey v. Leavy, (9th Cir. 1945), 149 F. 2d 889; Moore, Federal Practice, Vol. 6, §56.06, pages 2037-2042. Appellees were entitled to a summary judgment on the question of federal jurisdiction if no genuine issue existed as to any material fact and if the

moving party was entitled to a judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Two different theories of interstate commerce were presented to the district court on the cross motions for summary judgment. The district court rejected appellant's theory and adopted appellees' theory. We affirmed for the reasons given in our opinion. Thus, the only question now before us is whether under appellees' theory of interstate commerce a genuine issue existed as to any material fact. We are not concerned with the existence of a fact issue under appellant's theory of interstate commerce, which was rejected by the district court. See Walling v. Richmond Screw Anchor Co., (2d Cir., 1946), 154 F. 2d 780; Amaya v. Stanolind Oil Co., (S. D. Tex. 1945), 62 F. Supp. 181, affirmed (5th Cir. 1946), 158 F. 2d 554; Moore, Federal Practice, Vol. 6, §56.13, page 2092. We are satisfied from our re-examination of the record that there exists no genuine issue as to any material fact under appellees' motion for a summary judgment and that appellees were entitled to a judgment of dismissal of the action as a matter of law.

We have re-examined appellant's contentions that we erred in the application of principles of law, but are not persuaded to change the views expressed in our opinion.

The petition for rehearing is denied.

(Endorsed) *Per Curiam* Opinion Filed May 3, 1961.

Frank H. Schmid, Clerk.